20 November 2020

[REDACTED]
By email: [REDACTED]

Dear Madam / Sir,

RE: Consumer Credit Reforms

Thank you for the opportunity to respond to the proposed suite of changes to Australia's consumer credit framework contained in the *National Consumer Credit Protection Act 2009* (Cth).

The Economic Abuse Reference Group (EARG) has strong reservations about the proposed 'reforms' and the rollback of a responsible lending framework that has proven effective and accessible. The proposed reforms are a significant step backwards in progressive responsible lending laws and stand in direct contrast with the recent recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

We expect that the proposed reforms, as currently drafted, will create significant adverse impacts for victim-survivors of domestic and family violence (DFV) and financial abuse.

About EARG

The EARG is an informal group of community organisations which work collectively to influence government and industry responses to reduce the financial impact of family violence. Members include DFV services, community legal services and financial counselling services, and we involve other organisations in our work where relevant.

Some of our members have experience (as lawyers or financial counsellors) providing assistance to clients who have disputes about credit matters. See more details about EARG members and contributors below at Appendix 1.

Some of those members have provided additional input to Part Two of this submission in relation to the specific legislation.

About Economic Abuse

Economic abuse is a form of family, domestic and sexual violence. It has significant and devastating impacts at an individual, community and societal level. Economic abuse can take various forms, including accruing debt or other liabilities in the other person's name, controlling all finances, not contributing to joint loans, not making shared financial decisions, withholding necessities, preventing someone from obtaining or remaining in employment, and stopping someone from accessing education or a means to become financially independent.

Around 85% of women who access DFV services in Australia say that they have experienced some level of financial abuse as part of the coercive control in their relationship.[1] Economic abuse can occur alongside other forms of violence such as physical, emotional and sexual violence.

A recent study into the prevalence of economic abuse between intimate partners demonstrated that 11.5% of Australians had experienced it and that women experience it at higher rates (15.7%) than men (7.1%). The gender differences are important because it is well understood that family, domestic and sexual violence is gendered, that women are the majority of victims and experience more severe consequences.[2]

Debts are a common barrier to a victim-survivor leaving and staying out of an abusive relationship. A victim survivor can experience the financial impact long after the relationship has ended.

PART ONE: General concerns with Consumer Credit Reforms

1. Responsible lending laws protect against economic abuse

When responsible lending is done correctly it can help to prevent economic abuse because the lender will make reasonable inquiries about *each* applicant's financial position and assess the requirements, objectives and the financial situation of *each* borrower. This process is an effective mechanism to expose undue influence, imbalance of bargaining power and the underlying dynamic behind economic abuse.

Many of our members routinely help victim-survivors obtain their credit reports, which often reveal fraudulent attempts to obtain credit made by partners using personal identification information without their partner's knowledge or consent. Responsible lending obligations were likely the reason why those credit applications were rejected, therefore protecting the victim-survivor from experiencing further financial abuse. Without the operation of these laws, those applications would likely have been approved, leaving the victim-survivors in insurmountable debt and with fewer legal options to challenge that debt.

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[1] https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0/

[2] Kutin, J, Russell, R and Reid, M 2017, 'Economic abuse between intimate partners in Australia: Prevalence, health status, disability and financial stress', Australian and New Zealand Journal of Public Health, vol. 41, no. 3, pp. 269-274.

We understand that one of the drivers for these reforms is to allow banks to introduce faster and fully-automated online credit applications in the context of Open Banking. However, this means there will be little capacity to engage in any kind of check beyond an algorithmic assessment of available transaction history and the consumer's credit report, so there will be less opportunity to verify consent for joint applications, or identify whether the loan is in the consumer's benefit.

We believe this, along with an increase in online applications, remote signing and consent, removes opportunities to identify red flags for financial abuse of all kinds, but especially within the context of relationships. It also makes it much easier to perpetrate financial abuse as consumers will no longer be required to attend branches to sign paperwork. When you add in the removal of effective redress and remediation, the risks of harm for potential victims are greatly exacerbated.

We believe that under the proposed changes, the obligation to verify certain information will be removed, and with it, the opportunity to identify indicators of economic abuse and take appropriate steps to prevent it from occurring. This represents a systemic shift away from expectations set out in the Banking Code of Practice and in ABA guidance on family violence and financial abuse that banks should have appropriate processes and capability to detect and prevent financial abuse. Instead, the removal of responsible lending obligations envisages a lending environment where minimal information is relied upon, and opportunities or expectations to pick up on red flags are largely absent. As the regime for allocating liability for losses incurred via financial abuse rests largely on what notice the bank had of financial abuse, this means it will become increasingly difficult to detect, prevent, or compensate financial abuse.

While in theory, other laws may provide remedies for or help prevent some of these problems, they are generally less effective in practice, and are unlikely to facilitate timely redress from a credit provider.

Samara's Story

Samara (name changed) was a recent migrant, with three children and a victim survivor of family violence. Samara's husband forged her signature on home loan increases, which he then misappropriated and returned overseas with, leaving her with the debt.

There were multiple 'red flags' for financial abuse during the application process which the bank did not pick up or respond to.

With the assistance of a Community Legal Centre, Samara was able to argue that the bank was liable because it failed to pick up indicators of abuse and take appropriate action to prevent it from occurring.

2. Responsible lending laws can help provide redress for relationship debts

These reforms will reduce remedies for people who have experienced economic abuse. Our members will no longer be able to rely on Responsible Lending Obligations (**RLO**s) as a mechanism to help victim-survivors of financial abuse. RLOs can provide redress for irresponsible lending practices - such as victim survivors who are coerced into taking out credit facilities from which they derive no benefit, including the many women we see who have a car loan in their name when they do not even hold a driver's licence.

If the proposed reforms proceed, it will be much more difficult for people who have experienced economic abuse to seek redress such as compensation, debt waivers and alternative payment arrangements. It will make it **more likely that victims of financial abuse are compelled to return to or remain in an abusive relationship,** when the financial barriers to leaving are insurmountable**.** Even if they can escape the abuse and leave the relationship, they are unable to escape the burden of 'relationship debts', which often lead to homelessness, social exclusion, health problems and a greater reliance on Government and community support.

Maria's Story

Maria was only 20 years old when she sought assistance from a financial counsellor. She had been in an abusive relationship which had ended and was left with several debts as a result.

Her ex-partner had threatened to kill himself if she didn't help him buy a car. He was unable to get credit as he had a negative credit listing. She wasn't sure that she could afford the loan at the time as she was only 18 years old with a part time job. Under duress she applied for the loan in her name only and to her surprise it was approved. Not long after the car was purchased, her partner registered it in his name, took the car and moved out. She had never driven it. He said he would contribute to the loan but didn't pay a cent towards it.

After they broke up, she struggled for a couple of years paying the loan. She came to a point when she couldn't afford the loan anymore. The lender had been contacting regularly to chase up payments and didn't seem interested in her explanation of the circumstances around the loan. She was very distressed when she came to see a financial counsellor at the suggestion of a friend. The financial counsellor requested copies of documents relating to the contract and discovered that the assessment to check her serviceability of the loan was not accurate. The client said she never received a call from the lender to verify the details in the application.

The client suffered financial abuse, was coerced into taking out the loan and did not receive any benefit from the loan. The financial counsellor argued that the loan did not meet Responsible Lending Obligations and consequently the debt was waived. Without Responsible Lending Laws it may not have been possible to achieve this outcome and the client would have been saddled with paying the debt for many years.

3. The reforms will increase economic abuse and bad debt at a time when people need protection

It has been well documented that rates of domestic abuse have risen sharply in Australia during the COVID-19 pandemic. A recent study by the Australian Institute of Criminology found that two-thirds of women who experienced physical or sexual violence by a current or former cohabiting partner since the beginning of the pandemic said the violence had started or escalated in the three months prior to the survey and many women, specifically those experiencing more serious or complex forms of violence and abuse, reported safety concerns were a barrier to help-seeking.[3] We reasonably expect that removing critical protections at this time will have damaging impacts at a personal and policy level, and create a mountain of bad debt across all tiers of socio-economic status.

As the pandemic continues, vulnerable Australians are at increased risk of severe DFV, including economic abuse as a result of isolation from work, schools, friends and family and other support networks.[4] Barriers to leaving a violent partner are heightened, due to a loss of income and employment, fears around the risk of contracting or spreading the virus from interactions with service providers and increased difficulties in making an exit plan and getting the support they need to leave. Social isolation amplifies personal and collective vulnerabilities, while restricting support options.[5] Isolation paired with psychological and economic stressors accompanying the pandemic, as well as increases in negative coping mechanisms, can create the 'perfect storm' to trigger an unprecedented wave of family violence.

Victim-survivors need laws and policies that make it harder for perpetrators to use credit products to perpetrate economic abuse. Instead, the proposed reforms will make it easier for perpetrators of financial abuse to game the system. If responsible lending laws are repealed, we expect to see an increase in the frequency and severity of economic abuse *and* reduced options to help those people and free them from their debt burdens. This will lead to higher levels of unsustainable debt and personal insolvency and declines in consumer confidence.

4. An increase in economic abuse is bad for the economy

Studies show that DFV has a significant cost to the economy. In 2015–16, the financial cost of violence against women and their children in Australia was estimated at $22 billion.[6]

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[3] Boxall H, Morgan A & Brown R 2020. *The prevalence of domestic violence among women during the COVID-19 pandemic*. Statistical Bulletin no. 28. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/sb/sb28

[4] Peterman et al, 'Pandemics and Violence Against Women and Children' (Working Paper No 528, Center for Global Development, April 2020): http://iawmh.org/wp-content/uploads/2020/04/pandemics-and-vawg-april2.pdf.

[5] Van Gelder et al, 'Reducing the risk of infection might increase the risk of intimate partner violence' (2020) *EClinicalMedicine*: 10.1016/ j.eclinm.2020.100348.

[6] KPMG, *The Cost of Violence against Women and their Children in Australia* (May 2016) https://www.dss.gov.au/sites/default/files/documents/08_2016/the_cost_of_violence_against_women_and_their_children_in_australia_-_final_report_may_2016.pdf

The proposed reforms are inconsistent with the current Government's public commitments to women's economic independence and to preventing financial abuse, as outlined in the Women's Economic Security Statement for 2020-21.[7]

PART TWO: Specific concerns with the proposed legislative changes

Many of our members are experts who work with clients experiencing domestic and family violence, specifically in relation to economic abuse and credit disputes. These members have direct insight into the practical impact of the current credit and responsible lending regime. Some of them have contributed further commentary on the proposed reforms below.

1. No transparency or consistent standard for risk assessment

The proposed reforms provide that each lender will have their own systems, policies and processes which will be scaled depending on the credit being provided, in a move towards 'risk-based lending'. This will make it near impossible for lenders to be held accountable for their assessment of risk because each loan and each lender will be unique.

Case law has developed over time as courts have considered the operation of the NCCP Act, providing clarity to lenders about what is expected of them in order to comply with the current RLOs. The Full Federal Court's recent judgment in *Australian Securities and Investments Commission v Westpac Banking Corporation [2020] FCAFC 111* (ASIC v Westpac) resolved uncertainty in the financial services sector and confirmed that credit providers have flexibility in choosing how they conduct the unsuitability assessments required by the NCCP Act before providing credit to consumers. In dismissing ASIC's appeal, the Full Federal Court upheld Justice Perram's decision that '*A credit provider may do what it wants in the assessment process, so far as I can see; what it cannot do is make unsuitable loans.*'[8]

It is not clear from the Bill that lenders' systems, policies and processes will be made available to the public, so it will be extremely difficult for consumers (and advocates) to know if the lender has failed to apply those systems, policies and processes. Even under the current system, it can be challenging for advocates to obtain suitability assessments and loan application documents despite statutory provisions requiring the provision of those documents, let alone obtaining financial institutions' policies and processes. Under the proposed reforms, this will be even harder, if not impossible, leading to a severe lack of transparency.

2. Limited access to documents and credit standards

Currently, consumers and advocates may contact the credit provider to request copies of documents relating to the loan application, the suitability assessment and the evidence relied upon by the lender (including verification of the applicant's financial position) in order to make this suitability assessment. This allows people who have experienced economic abuse to properly understand and verify the

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[7] Women's Economic Security Statement 2020, https://www.pmc.gov.au/sites/default/files/images/wess/wess-2020-report.pdf

[8] in *Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 at [82].

process by which a loan was assessed, verified and approved, in circumstances where they have often been excluded from the application process and had critical financial documents withheld or destroyed by their abuser.
It is not unusual for victim-survivors of economic abuse, upon leaving an abusive relationship, to have no knowledge of their assets and liabilities, credit contracts in their name, their credit score or their financial position more broadly.

The exposure draft explanatory materials outline the obligation to provide documents to consumers from Part 1.63 onwards. However, the provisions in the non-ADI credit standards are limited to giving the consumer a copy of the credit assessment. It is common for victim-survivors of economic abuse to have had no involvement in the credit application process. These consumers, and their advocates, rely heavily on being able to access their loan application and verification documents within statutory timeframes under the current NCCP Act.

Further, we are concerned there is a risk that lenders will refuse to release some documentation. This in effect means financial institutions can write their own rules that they're allowed to change whenever they like, and they don't even have to show consumers the rule book.

3. Removing consideration of borrowers' requirements and objectives

Under the current RLOs lenders need to consider *each* applicant's requirements and objectives. This is **a key protection for victim-survivors of domestic violence and economic abuse** because if done correctly, it should be apparent if the applicant, or one of the applicants, will get no benefit from the loan. Removing this protection and shifting the onus onto the applicant will result in lenders missing vital signs of economic abuse.

Diane's Story

Diane (name changed) was a single mother who had escaped from an abusive relationship. Diane had obtained a number of loans within a 12-month period with two of the big four banks (three personal loans which she still owed over $36,000) and an additional loan with a second tier lender for over $11,000. The loans had been part of a pattern of financial abuse at the hands of her then partner. Her ex-partner had used the loans from the banks to fund an overseas holiday, and pay off a credit card that was in Diane's name but used by her ex-partner. When Diane sought assistance she was unable to meet repayments and had an Apprehended Domestic Violence Order in place over her ex-partner who was facing criminal charges.

A community legal centre helped Diane lodge an internal dispute with all three lenders arguing that the credit providers had failed in their responsible lending obligations and provided unsuitable loans.

Whilst the NCCP also includes protections against “unjust loans”, those provisions require the lender to be on notice of the unjustness (i.e. they needed to have seen something that indicated that abuse was taking place). Given the way financial services products are now largely online, there would be very little evidence of unjustness the lender would have been on notice to. The responsible lending provision, however, did assist in Diane’s case above as the bank was required to make inquiries as to the loans purpose and its affordability beyond what the unjustness provisions require. Diane’s lawyers were able to reach positive outcomes with her lenders after making these arguments. Had responsible lending laws not been in place it would have been much harder to assist Diane with these debts. She may not have been able to get help at all.

Ruth’s Story

Ruth (name changed) was in an abusive relationship for 5 years. She had a steady full-time job, which her partner manipulated for his benefit as he had no legitimate source of income. He would often coerce her into taking out loans in her name for his benefit, promising to repay her, but would withhold repayments as a way of punishing her when he was upset or angry.

Ruth’s partner visited an electronics store with her partner in 2018. When the sales assistant explained he could walk out with products that day if he applied for a store credit card, he picked out a new phone, iPad and headphones for himself. Although he did all the talking, when he was refused credit due to his poor credit score, the sales assistant suggested putting Ruth’s name on the application form instead. Ruth felt she had no choice but to sign the form because she had learnt from past experience that refusing to give her partner money would often result in violence. She was shocked that the application was approved within minutes, considering she was already defaulting on her repayments for a credit card from the same lender. Ruth soon defaulted on this card as well, because her partner took the electronics items and refused to contribute to any of the repayments.

When Ruth’s community lawyer obtained the loan documents from the lender, it became apparent that in the application and assessment process, the lender had not made any inquiries about Ruth’s requirements and objectives or taken into account her existing credit card. Had the lender made proper inquiries of Ruth, it would have been clear that the credit card did not meet her requirements and objectives as it clearly was not for her benefit, and she could not afford it as she was already defaulting on her existing credit card repayments. Ruth’s lawyers successfully argued that the lender had breached its responsible lending obligations and failed to identify the obvious signs of financial abuse. The lender agreed to waive the outstanding amount and remove the default listing from her credit report.

Additionally, the new non-ADI credit standards are deemed not to apply in circumstances where credit is genuinely provided for a small business purpose that is not ‘minor or incidental to the overall purpose of credit’. This appears on its face to be a lower threshold than that of the NCCP Act itself, which does not apply where lending is ‘predominantly for a small business purpose’.

This is relevant because of circumstances where a perpetrator of economic abuse may overstate the extent to which credit is sought for a family business or sole trader rather than wholly domestic use, and obfuscate the extent of a victim’s actual benefit. We consider that appropriate consideration of every applicant's requirements and objectives achieves the dual purposes of identifying economic abuse indicators and ensuring credit is being issued under the appropriate legislative framework generally.

4. Borrower responsibility provisions

The proposed reforms suggest that a licensee's systems, policies and processes must include an assessment criteria, and that criteria must enable the licensee to assess whether the consumer will be able to repay the credit without facing substantial hardship. The assessment includes making reasonable inquiries and taking reasonable steps to verify the income and indebtedness of the consumer. However, this is undermined by:

- The proposal that, '(t)he criteria must allow for the assessment to be proportionate to the nature, type and size of the credit. This is intended to ensure lenders have flexibility to scale their credit assessments according to the characteristics of the borrower and credit product, while reflecting the relative risk involved'; and
- Introducing borrower responsibility where 'the licensee may choose to rely on the information provided by the consumer unless there are reasonable grounds to believe the information provided is unreliable'.[9]

If lenders are allowed to scale their assessment criteria *and* presume that all information provided by the consumer is accurate (and therefore not make reasonable inquiries) this creates a perfect storm which facilitates economic abuse. Our members regularly assist victim-survivors whose partners have obtained credit in their name through coercion or fraud, by providing false information which the lender did not make inquiries about or take steps to verify.

Amy's Story

Amy was a young mum of three children. She moved from interstate to escape her violent ex-partner. She was unemployed and struggling to support her children. When they were together her ex-partner had taken out a credit card in Amy's name without her knowledge. When she found out she was too scared to do anything about it.

The lender started chasing Amy to repay the debt, and wouldn't accept her explanation of what had happened. Amy was very stressed and upset as she couldn't afford to make repayments. Amy approached a financial counsellor for support. When the financial counsellor requested copies of documents related to the loan, they discovered information in the application did not match the supporting documents provided. Despite this Amy had never received a call from the lender to verify the details in the application.

The financial counsellor argued on behalf of Amy, that this did not meet Responsible Lending requirements, and with this advocacy Amy's debt was waived. Without Responsible Lending Laws this outcome would not likely have been achieved and Amy would have spent many years burdened by debt.

[9] Exposure Draft Explanatory Memorandum, Appendix A, Section 8 – Credit Assessment, pages 5 and 6.

Debbie's Story

Debbie (name changed) was in her late 50s when she separated from her partner of over 10 years. Her partner was a gambler and exercised control over all areas of her life, refused to allow her to access to their bank accounts and forced her to live off a small allowance. Any resistance was met with severe violence and her allowance being cut off.

When Debbie separated from her partner, she discovered that the home they previously owned outright had been almost entirely mortgaged through successive loans. The current lender was threatening to repossess her home as the mortgage was in arrears. Debbie was pressured by her partner to quickly sell the home, leaving her with next to nothing once the mortgage was discharged. Debbie was homeless and struggling to survive when she sought help from a community legal centre.

Debbie was shocked to learn the amount of debt her partner had put her in. When Debbie read the joint loan application, she identified that partner had understated their living expenses and failed to disclose their liabilities. She recalled that throughout their relationship her partner would get her to sign papers that she was not allowed to read or ask questions about. She had no recollection of ever speaking to the lender directly. Despite Debbie being on the title for the secured property and jointly and severally liable for the mortgage, the lender's records noted they never attempted to contact Debbie about the mortgage application, or ask what the money would be used for.

Debbie's lawyers assisted her to make complaints on the basis that the lenders had not correctly applied the responsible lending laws, specifically that they had failed to make inquiries about the information in the application or consider Debbie's requirements and objectives for the loan, given she did not receive any benefit. On this basis Debbie's lawyers were able to successfully negotiate compensation and a fair resolution that allowed Debbie to start a new life, independent from her abuser.

5. Best interest obligations

We support the general principle and standard of behaviour contained within the 'best interest obligations'. However, we consider this obligation should be imposed on all credit providers **in addition to and not instead of** RLOs, as it does not consider or resolve conflicts between co-borrowers or guarantors (in particular, the requirement to consider the requirements and objectives of *each* co-borrower).

It is not uncommon in cases of economic abuse for brokers to have a personal or professional relationship with the perpetrator of the abuse, and fail to act in the best interests of *both* borrowers or disclose conflicts of interest to the co-borrower who is experiencing economic abuse.

6. Business purposes test

We have significant concerns about the replacement of the 'predominant purpose' test (that a loan be used predominantly (more than 50%) for a personal, domestic or household purpose) with a test that excludes the application of the standards from any credit that is in part for a small business purpose, provided that purpose is 'genuine and not merely minor or incidental' in relation to the overall purpose of the credit contract. This proposed test is alarmingly vague and broad, and risks removing consumer protections for a whole suite of loans which are primarily for consumer purposes. With no reasoning provided in the explanatory materials, this change appears to be intended to further strip back consumer protections and carve out even more forms of credit from the standards.

Some of our members have assisted victim-survivors of economic abuse who have been made ‘puppet directors’ of companies operated by their (often bankrupt) partners. It is typical in these circumstances for the victim-survivor to be saddled with a car loan which is in the business’s name, despite the car being largely used as a family car, so that the lender does not need to conduct a suitability assessment and comply with the RLOs. The current ‘predominant purpose’ test in the NCCP Act allows advocates to establish that the car loan was in fact obtained predominantly for a personal, domestic or household purpose, thereby bringing it within the operation of the RLOs and exposing the lender’s failure to comply with the RLOs. In many cases, advocates can successfully negotiate the repossession of the car and a waiver of the outstanding debt, freeing the victim-survivor from liability for a car loan they never should have been given.

Under the proposed reforms, any loan that is used for a ‘partial small business purpose’, however small, would be excluded from the protections of the draft standards. This would result in advocates using their already limited resources to engage in complex factual debates with lenders about whether the standards apply. For example, if the car was used by the client’s partner to make a business-related trip or delivery, the client would be excluded from consumer protections and left without a remedy. As victim-survivors fleeing DFV and economic abuse rarely have financial records, loan documents and contracts available to them (in many cases because they have been withheld or destroyed by their abuser), advocates already face an uphill battle in bringing complaints against lenders. This will become increasingly difficult if consumers are required to prove that the loan did not have even a ‘partial small business purpose’, rather than being able to simply show that it was used ‘more than 50%’ for a non-business purpose.

Sara’s Story

Sara (name changed) was an unemployed young mother with two infant children when her husband Amir took her to a car dealership in 2018. Amir did all the talking and negotiated a loan for a new car, which he told her would be a joint loan. As Sara speaks limited English, she was unable to read or understand any of the documents he told her to sign, but she had experienced persistent physical abuse and felt it was not safe for her to challenge him.

At the time, Sara was not working as she was at home caring for their young children. Amir was the only person who drove the luxury car, worth $60,000, but because it was registered in her name, Sara was liable for all of the tolls and fines he incurred. When the relationship ended, Amir left the car with Sara, unregistered and uninsured, and with $55,000 owing on the loan.

When Sara sought legal advice, she discovered the car loan was solely in her name. When her community lawyer obtained the loan documents, it became clear Amir had negotiated the contract with the lender for several weeks in his own name, and had only replaced his name with Sara’s on the day of signing the contract so that she would bear the full liability.

As Sara was unemployed and had no income at the time, she believes Amir falsified payslips in her name so that she would qualify for the loan. The contract also stated it was for ‘business purposes only’, despite neither Sara nor Amir having a business or even an ABN. The lender relied on this to initially refuse to provide the loan documents, and later to argue that the responsible lending obligations did not apply.

Had the lender spoken to Sara at all, or taken reasonable steps to verify her payslips and other information, it would have been obvious the loan did not meet her requirements and objectives and that she certainly could not afford to repay it. The lender failed to identify or act on the significant warning signs of financial abuse. Sara’s lawyers were able to successfully argue that the responsible lending obligations did apply to the contract and were breached, and negotiated for the lender to collect the car and waive all of Sara’s outstanding debt.

7. APRA as regulator and removal of enforcement mechanisms

We have concerns about the Australian Prudential Regulation Authority (APRA) being the sole regulator responsible for monitoring compliance with consumer credit laws. The Bill provides for no corresponding expansion of APRA's enforcement powers to enable it to adequately protect individual consumers. Nor has there been an indication of what, if any, organisational changes would be implemented at APRA to assist it to act as sole regulator given it has never had a consumer protection role previously.

In comparison, the Australian Securities and Investments Commission (ASIC) already has the experience, expertise and necessary enforcement powers to effectively monitor compliance and protect consumers, which has a strong deterrent effect on lenders.

Further, we have serious concerns that the amended credit laws provide no practical enforcement mechanism for breaches, despite the Banking Royal Commission calling for better enforcement of the RLOs.

The Bill removes the civil penalty provisions for individual instances of misconduct, reducing any incentive for lenders to take care in providing individual credit contracts. It instead imposes a system of only penalising a lender's repeated breaches, regardless of the significant harm caused to individual consumers by single breaches.

This will allow bad debt to balloon with no effective enforcement mechanisms or redress, as the regulator would be unable to take action unless a lender does not establish, document or maintain the required systems, policies and processes, or 'repeatedly' fails to implement those systems, policies and processes. The Bill does not indicate what level of misconduct would be required to amount to a repeated breach and attract the attention of the regulator. Meanwhile, people who have experienced economic abuse and been issued unsuitable credit contracts will be left in crippling debt with no avenues for recourse and no justice, unless the regulator identifies that their case is indicative of a systemic breach and decides to take action against the lender.

8. Removal of access to remedies

The Bill proposes to remove rights to the remedial process for individual consumers. While the Bill provides that consumers will retain the right to take breaches of the standards to the Australian Financial Complaints Authority (AFCA), it removes the ability for individual consumers to seek court remedies for breaches of the RLOs. This will make it harder for victim-survivors to assert their rights and achieve redress when they have been unfairly treated.

As the case studies above demonstrate, the RLOs provide the backbone for victim-survivors of financial abuse to make complaints to financial institutions and achieve some form of redress. Without the RLOs, all of these clients would have been overwhelmed with debt for years, in some cases decades, to pay off credit contracts they could not afford, did not benefit from and should never have been given.

The Ministerial standards focus on policies, processes and systems rather than individual rights, and impose vague requirements on lenders that individual consumers have no ability to enforce. Despite notionally retaining AFCA's role, the Bill severely limits the practical ability of individual consumers to make complaints to AFCA in respect of these standards. As discussed above, we are concerned that financial institutions will have no clear obligation to provide copies of these policies and processes, so it is unclear how an individual consumer could provide the evidence required to establish that the lender has failed to have or document those systems, policies and processes. Any remedy will be difficult to fairly obtain.

The reforms represent a shift towards penalising systemic breaches of the law, regardless of the harm caused to individual consumers, particularly those who have experienced economic abuse. Penalising lenders for systemic and repeated misconduct will not put our clients back in the position they would have been in but for the lender's misconduct.

We are concerned that reducing redress for individual consumers will have a detrimental effect on the ability of our clients to rebuild their lives and financial security after experiencing DFV and economic abuse.

Jessica's Story

When Jessica (name changed) met her partner, she had long term employment, a stable rental and significant savings. After they moved in together, Jessica's partner became increasingly reliant on her to pay for the rent, bills and groceries. Slowly, the controlling behaviour escalated and he manipulated her into gaining access to her online banking, which he used to get approval for a credit card in Jessica's name without her knowledge. The bank did not make any enquires with Jessica directly, even though the application included a secondary card for her partner's use.

Jessica was also coerced into buying her partner an expensive luxury car under a loan for which she was the principal borrower and he contributed nothing. Jessica was only on a provisional license and couldn't even drive the car. The financial institution did not assess Jessica's requirements, objectives and financial situation when approving this loan.

Within only weeks of approval, Jessica was struggling to afford the repayments across the loan and credit card. Her partner refused to contribute. When Jessica confronted him about money, he assaulted her. Shortly after Jessica obtained an Apprehended Domestic Violence Order, her partner fled Australia and left Jessica with all the debt.

For years, Jessica was chased by debt collectors, yet credit providers were continuing to lend to her causing her to fall deeper into a debt spiral. She had debt recovery proceedings against her and she was on the verge of homelessness when she sought help from a community legal centre. The CLC represented Jessica in complaints to the credit providers on the basis that they did not comply with their responsible lending obligations. As a result, Jessica was compensated $25,000 and had a total of $80,000 debt waived which finally gave her financial independence and hope for the future.

Conclusion

Our single recommendation is to retain the responsible lending obligations in their current form in the NCCP Act, with more effective enforcement.

The proposed reforms are a significant step backwards in progressive responsible lending laws and stand in direct contrast with the recent recommendations of the Banking Royal Commission. We echo Commissioner Hayne's first and key recommendation arising out of the Banking Royal Commission:

I am not persuaded that the NCCP Act's framework for responsible lending to consumers' needs change. The responsible lending issues identified during the Commission's hearings will be resolved by banks applying the law as it stands.[10]

In recent years we have seen significant momentum from lenders, particularly major banks, improving their policies and identification of economic abuse and improving their compliance. Significant steps have been made in the right direction and are already having tangible impacts in improving individual outcomes for consumers, facilitated by the operation of the current RLOs.

The Banking Royal Commission and the Full Federal Court's decision in ASIC v Westpac have given lenders greater clarity of what is required of them in complying with the RLOs. While the current system may be imperfect and would be improved by greater enforcement of misconduct, the system is working.

We expect that the proposed reforms, as currently drafted, will create significant adverse impacts for victims of domestic and family violence and financial abuse.

Thank you for the opportunity to contribute our expertise to this consultation. We would welcome any opportunity to discuss our submission further.

Yours Sincerely,
Economic Abuse Reference Group

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[10] Banking Royal Commission, *Final Report, Volume 1,* 2019, available at: https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf, p117.

Appendix 1

The Economic Abuse Reference Group is an informal group of community organisations which influences government and industry responses to the financial impact of domestic and family violence. Our members include family violence services, community legal services and financial counselling services.

Initially established to consider recommendations of the Royal Commission into Family Violence in Victoria, EARG has input to national issues such as banking and insurance. The Victorian and New South Wales chapters have input to state issues (for example energy, tenancy and fines).

Not all organisations contribute on every issue – and other organisations may contribute from time to time.

Organisations which contribute to EARG's work include:

- Care Financial Counselling Service & Consumer Law Centre (ACT)
- Centre for Women's Economic Safety
- Consumer Action Law Centre
- Council of the Single Mother and Her Children
- Domestic Violence NSW
- Domestic Violence Victoria
- Financial Counsellors Association of NSW
- Financial Counselling Australia
- Financial Counselling Victoria
- Financial Rights Legal Centre (NSW)
- Good Shepherd Youth and Family Services Australia & New Zealand
- Justice Connect
- Legal Aid NSW
- Legal Aid Qld
- No to Violence
- Northern Rivers Community Legal Centre
- Redfern Legal Centre's Financial Abuse Service NSW
- Social Security Rights Victoria
- Thriving Communities Partnership
- Uniting Kildonan
- Victoria Legal Aid
- WestJustice
- Women's Information & Referral Exchange (WIRE)
- Women's Legal Service NSW
- Women's Legal Service Qld
- Women's Legal Service Victoria